PD-0449-21

ORAL ARGUMENT REQUESTED

COURT OF CRIMINAL APPEALS OF TEXAS

PHILLIP ANDREW CAMPBELL Appellant

v.

THE STATE OF TEXAS Appellee

On Appeal from the 413th District Court of Johnson County, Texas
Cause No. DC-F201800948
{*The Honorable William Bosworth Presiding*}

and

Cause No. 10-19-00191-CR
from
THE COURT OF APPEALS FOR THE TENTH JUDICIAL DISTRICT
WACO, TEXAS

PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF TRIAL COURT, PARTIES, AND COUNSEL

In accordance with Rule 68.4 of the Texas Rules of Appellate Procedure, the following is a list of names and addresses of the trial court, parties, and counsel:

Trial Court:	Hon. William Bosworth 413th Judicial District Court Johnson County, Texas Guinn Justice Center 204 S. Buffalo Cleburne, Texas 76033
Appellant:	Phillip Andrew Campbell
Trial Counsel for Appellant:	Don W. Bonner 16 N. Caddo Street Cleburne, TX 76031
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Trial Counsel for the State:	Dale Hanna J. Ryan Eady Timothy M. Good Johnson County District Attorney Guinn Justice Center 204 S. Buffalo Cleburne, Texas 76033
Appellate Counsel for the State:	David Vernon Johnson County District Attorney Guinn Justice Center 204 S. Buffalo Cleburne, Texas 76033

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COURT OF CRIMINAL APPEALS OF TEXAS

PHILLIP ANDREW CAMPBELL Appellant

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WACO, TEXAS

PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE JUDGES OF

THE COURT OF CRIMINAL APPEALS:

Phillip Andrew Campbell (hereinafter sometimes referred to as "Appellant,") submits this Petition for Discretionary Review of Appellant, and would respectfully show unto the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested as this case involves the application of important Court of Criminal Appeals precedent.

STATEMENT OF THE CASE

Appellant was charged by indictment with the first degree felony offense of Murder (CR vol. 1, page 22). Appellant entered a plea of not guilty and requested a jury trial with punishment to be assessed by the jury in the event that he was found guilty. (CR vol. 1, page 35, RR vol. 4, page 14). A jury found appellant guilty of murder. (CR vol. 1, page 167, RR vol. 6, page 226). He was sentenced to life imprisonment in the Institutional Division of the Texas Department of Criminal Justice and assessed a ten thousand dollar fine. (CR vol. 1 page 167, RR vol. 6, page 126). The verdict was appealed to the Tenth Court of Appeals in Waco, Texas. The Court of Appeals affirmed the jury's verdict in a split decision, with Justices Neill and Johnson joining in the opinion and Chief Justice Gray filing a dissenting opinion. Appellant now respectfully brings this Petition for Discretionary Review to the Texas Court of Criminal Appeals and asks the Court to resolve the issue.

STATEMENT OF PROCEDURAL HISTORY

Appellant appealed to the Tenth Court of Appeals in Waco, Texas. In an opinion authored by the Honorable John E. Neill, released on May 19, 2021, the Court affirmed Appellant's conviction. (Apx. A.). A dissenting opinion was

authored by the Honorable Tom Gray, Chief Justice, where Chief Justice Gray disagreed with the opinion of the court and would have reversed the judgment of the trial court and remanded it to the trial court for new trial. (Apx. B.).

GROUND FOR REVIEW

Did the jury charge in a case that involved autoerotic asphyxiation that led to the death of one of the participants and a conviction of murder for the other participant, and contained an incorrect definition of "intentionally," which allowed the jury to find the Appellant guilty merely by finding that he intended the action, rather than intending the result, cause harm.

ARGUMENT AND AUTHORITIES

The State conceded at oral argument at the Court of Appeals that the jury charge for murder included an erroneous definition of "intentionally." The charge included a definition of "intentionally" with regard to the "nature of conduct" when "result of conduct" was the only proper *mens rea* for the conduct at issue, murder. The definition in the charge was not "tailored" to the offense as required. *See Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015) ("A trial court errs when it fails to limit the language in regard to the applicable culpable mental states to the appropriate conduct element."). This allowed the jury to find the Appellant guilty of murder simply by intending the conduct, or the choking. There was no

dispute at the trial level that the victim and Appellant were engaging in autoerotic asphyxiation and that Appellant choked the victim to enhance sexual pleasure. Appellant objected to this erroneous definition of intentionally at the trial court level. Because the State admitted at oral argument in the Court of Appeals that the definition of the charge was incorrect, the only question for this Court in this single-issue is whether Appellant suffered "some" harm. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Murder is a result of conduct offense. *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003). Appellant choked Jade. Jade died as a result. Did appellant intend the result? That was one option in the charge available to the jury.

In his dissent, Chief Justice Gray said:

> We must determine if the error in the definition of "intentionally" as included in the jury charge caused "some" harm. As the Court of Criminal Appeals recently stated in *Jordan v. State*, 593 S.W.3d 340 (Tex. Crim. App. 2020):
>
> > "Some harm" means actual harm and not merely a theoretical complaint. *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013); *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012). Reversal is required if the error was calculated to injure the rights of the defendant. *Cornet*, 417 S.W.3d at 449 (quoting *Almanza,* 686 S.W.2d at 171).

Chief Justice Gray went on to say:

> Where I believe I differ from the analysis of my colleagues is whether there is "actual" not merely "theoretical" harm. I have read many cases that mention the topic. The articulation of the test is the same for "egregious" harm versus "some" harm in that both mean "actual"

> harm and not merely a "theoretical" complaint. But surely, the test must have some difference as to the actual versus theoretical nature of the harm; otherwise, how are we to consistently apply a standard for determining the extent of the harm? There are a lot more cases that discuss "egregious harm," and finding such harm is exceedingly rare. I believe that, even under those cases, this case could very well be egregious harm.

Justice Gray went on to point out that in a civil proceeding, if an improper theory of liability were in the charge and was properly objected to, the error would be harmful because the party would not know and could not show on appeal that the verdict was based on an improper theory. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). Therefore, it is easier to show harm in a civil case where a money judgment is at stake, than to show harm in this criminal case, where life in prison is at stake. This is because, if just one juror looked at the incorrect definition of intentionally and voted to convict appellant of murder because he choke Jade (nature of conduct) and she died as a result, then appellant has been convicted on conduct that is not murder and had no ability to show actual harm. The definition erroneously given takes from appellant his only viable defense against the charge of murder. The decision of the Court of Appeals to say that there was no actual harm sets a dangerous precedent. If allowed to stand, the incorrect definition of harm could be used in every murder case, allowing the jury to convict every Defendant of murder based on whether he intended the conduct or intended the result.

Neither party has the duty to prove the presence or absence of harm. *Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008) ("To dispel any lack of clarity in our cases, we affirm that burdens of proof or persuasion have no place in a harm analysis conducted under *Almanza*."); *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000); *see also Elizondo v. State*, 487 S.W.3d 185, 205 (Tex. Crim. App. 2016) ("Neither Elizondo nor the State has the burden with regard to showing or proving harm. We must make our own assessment as to whether harm occurred."). A reviewing court has an independent duty to determine if appellant was harmed by the improper definition of "intentionally" included in the charge. As Justice Gray pointed out, there was not a jury note asking whether they all have to agree that he intended to cause death or that they only had to agree that he intended to choke her. As he further stated:

> If that is what it takes for us to determine that this is "actual" and not "theoretical" harm, then there will be few cases ever reversed because of charge error. I do not think the test is, or should be, so demanding. In reading the closing arguments, because the charge allowed a conviction on merely the intent to choke Jade, appellant's trial attorney could not argue that, while appellant intended to choke Jade to heighten the sexual pleasure, he did not intend to kill her. To dance around this issue, the argument was made that the death was an "accident." Well, the jury knew, and the State argued, that this, choking Jade, was no "accident."
>
> To paraphrase the last sentence from *Jordan* quoted above as applicable to the relevant evaluation in this case:

The record in this case demonstrates some harm because the only contested issue was intent, and the failure of the definition of "intentionally" to limit the relevant conduct to intending the result made the finding of murder all but inevitable.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court grant discretionary review and remand to the court of appeals for further proceedings consistent with the evidence in this case. Tex. R. App. Pro. 78.1(d).

Respectfully Submitted,

By: /s/ Johnna McArthur
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SBN 24046377

CERTIFICATE OF COMPLIANCE

Appellant's Petition for Discretionary Review, according to the word count function of counsel for Appellant's word-processing software, contains 2100 words, even including those items permitted to be excluded, save for the Appendices. As this is within the limits established, Appellant respectfully certifies compliance.

/s/ Johnna McArthur
Johnna McArthur
Attorney for Appellant

CERTIFICATE OF SERVICE

By affixing my signature below, I hereby certify that a true and correct copy of the foregoing *Petition for Discretionary Review* has been electronically delivered on this day, June 18, 2021, to the State Prosecuting Attorney and the Johnson Couonty District Attorney by e-service.

/s/ Johnna McArthur
Johnna McArthur
Attorney for Appellant

IN THE
TENTH COURT OF APPEALS

No. 10-19-00191-CR

PHILLIP ANDREW CAMPBELL,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 413th District Court
Johnson County, Texas
Trial Court No. DC-F201700948

OPINION

The jury convicted Phillip Campbell of the offense of murder and assessed his punishment at confinement for life. We affirm.

BACKGROUND FACTS

Phillip Campbell and Jade Wright were friends, and Campbell would purchase drugs from Wright on occasion. On October 5, 2017, Campbell and Wright agreed to meet at a hotel where Campbell would give her money in exchange for sex. Campbell

testified that he and Wright engaged in erotic asphyxiation during sex. Wright died of manual strangulation.

JURY CHARGE

In his sole issue on appeal, Campbell argues that the trial court erred in defining "intentionally" in the jury charge. If error exists in the jury charge, we analyze the harm, if any, resulting from the error. *See Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). If the error was preserved by objection, as it was in this case, any error that is not harmless will constitute reversible error. *Id*. The actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *Almanza v. State*, 686 S.W.2d at 171. To obtain a reversal for jury-charge error, an appellant must have suffered actual harm, not merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986).

Campbell objected to the trial court's definition of "intentionally" in the jury charge. The charge defined intentionally as:

> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

Campbell contends that intentional murder is a result of conduct offense and that the charge was in error because it defined intentionally as it relates to both the "nature" of his conduct as well as the "result" of his conduct.

Assuming without agreeing that the trial court erred in charging the jury on the definition of intentionally, we find that any error was harmless. A person commits the offense of murder if he:

> (1) intentionally or knowingly causes the death of an individual;
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; …

TEX. PENAL CODE ANN. § 19.02 (b). The indictment alleged that Campbell intentionally or knowingly caused the death of Wright by impeding the normal breathing or circulation of the blood of Wright or by applying pressure to the throat or neck of Wright. The indictment further alleged in the alternative that Campbell, with intent to cause serious bodily injury to Wright, committed an act clearly dangerous to human life that caused the death of Wright by impeding the normal breathing or circulation of the blood of Wright or by applying pressure to the throat or neck of Wright.

The application portion of the charge tracked the language of the indictment and authorized the jury to convict Campbell of the offense of murder if they found beyond a reasonable doubt that he 1) intentionally caused the death of Wright, 2) knowingly caused the death of Wright, or 3) with intent to cause serious bodily injury, committed an act clearly dangerous to human life and caused the death of Wright. The jury returned

a general verdict that does not indicate on which alternative theory of murder it convicted Campbell.

Campbell contends that the jury could have convicted him based upon a finding that he intended the conduct, choking Wright, and not the result. To obtain a reversal for jury-charge error, an appellant must have suffered actual harm, not merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012). The jury was authorized to convict Campbell of murder if they found he knowingly caused the death of Wright. Although the abstract portion of the charge defined intentionally in relation to both the result of conduct and the nature of conduct, the charge limited the definition of knowingly to result of conduct. The jury could have convicted Campbell by finding that he intentionally caused the death of Wright in that he intended the result of his conduct or that he knowingly caused the death of Wright. Because the jury charge provided alternative manner and means as well as alternative mental states, Campbell has not shown actual harm in the jury charge.

In addition, the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *Almanza v. State*, 686 S.W.2d at 171. The State presented evidence that Campbell was in possession of numerous pornographic videos that contained acts of manual strangulation and necrophilia. The State also presented

evidence that Wright died from manual strangulation that would require a strong compressive force for three to five minutes to cause death. The State emphasized in its closing arguments that Campbell intended to kill Wright based on his sexual fantasies. Viewing any harm in light of the entire jury charge, the state of the evidence, and the argument of counsel, we find that any error in the jury charge was harmless. We overrule Campbell's sole issue on appeal.

CONCLUSION

We affirm the trial court's judgment.

JOHN E. NEILL
Justice

Before Chief Justice Gray,
Justice Neill, and
Justice Johnson
(Chief Justice Gray dissenting)
Affirmed
Opinion delivered and filed May 19, 2021
Publish
[CRPM]

IN THE
TENTH COURT OF APPEALS

No. 10-19-00191-CR

PHILLIP ANDREW CAMPBELL,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 413th District Court
Johnson County, Texas
Trial Court No. DC-F201700948

DISSENTING OPINION

Jade died because appellant used his hands to squeeze her neck hard enough and for enough time to cut off the blood flow to her brain resulting in her death. On this, there is really no dispute. There is also no dispute that Jade and appellant were consenting adults that had agreed to engage in what some would call rough sex or erotic asphyxiation, while others would call it disgusting or aberrant behavior. Even if Jade agreed to rough sex, there is no question that the conduct actually engaged in far exceeded the scope of her consent. The autopsy evidence indicated she had been beaten.

After telling her mother she would be home in about 30 minutes, the home to which she returned is eternal. But neither the jury nor this Court are here to judge the morality of the conduct in which these adults were engaged. The question for the jury to answer was whether her death was murder, and if not murder, was it manslaughter, and if not manslaughter, was it criminally negligent homicide. Our job is to determine if the trial court made an error that affected the judgment.

The State conceded at oral argument that the jury charge for murder erroneously included a definition of "intentionally." The charge included a definition of "intentionally" with regard to the "nature of conduct" when "result of conduct" was the only proper *mens rea* for the conduct at issue, murder. The definition in the charge was not "tailored" to the offense as required. *See Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015) ("A trial court errs when it fails to limit the language in regard to the applicable culpable mental states to the appropriate conduct element."). Appellant's only objection to the charge, and thus his focused objection, was that the definition of intentionally should be limited as appropriate for the "result" of conduct as indicted, murder. The charge was erroneous. Thus, the only question for this Court in this single-issue appeal is no longer about first determining whether the charge was erroneous. Rather, the sole question now is whether appellant suffered "some" harm. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Murder is a result of conduct offense. *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003). Appellant choked Jade. Jade died as a result. Did appellant intend the result? That was one option in the charge available to the jury. There were at least

five different ways, manner and means, that would allow an affirmative answer to that question. An affirmative answer to that question found adequate support in the record on at least three of the manner and means. While the evidence is considered as one of the factors in the *Davis* analysis as described in *Almanza*, *see Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985) (*citing Davis v. State*, 13 S.W. 994, 995 (1890)), this is not the traditional sufficiency of the evidence analysis of *Jackson v. Virginia*. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). But the charge included an admittedly erroneous definition of "intentionally" that allowed the jury to convict the appellant if he intended to choke Jade. That he intended to choke Jade was not disputed. But because of the erroneous definition of "intentionally" in the charge, the jury could find him guilty of murder based on conduct that does not constitute murder.

We must determine if the error in the definition of "intentionally" as included in the jury charge caused "some" harm. As the Court of Criminal Appeals recently stated in *Jordan v. State*, 593 S.W.3d 340 (Tex. Crim. App. 2020):

> "Some harm" means actual harm and not merely a theoretical complaint. *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013); *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012). Reversal is required if the error was calculated to injure the rights of the defendant. *Cornet*, 417 S.W.3d at 449 (quoting *Almanza,* 686 S.W.2d at 171).
>
> To assess harm, we must evaluate the whole record, including the jury charge, contested issues, weight of the probative evidence, arguments of counsel, and other relevant information. *See Cornet*, 417 S.W.3d at 450; *Almanza*, 686 S.W.2d at 171. The record in this case demonstrates some harm because the only contested issue was self-defense, and the failure of the self-defense instructions to reference "Royal or others" made rejection of the defense inevitable.

Id. at 347.

Where I believe I differ from the analysis of my colleagues is whether there is "actual" not merely "theoretical" harm. I have read many cases that mention the topic. The articulation of the test is the same for "egregious" harm versus "some" harm in that both mean "actual" harm and not merely a "theoretical" complaint. But surely, the test must have some difference as to the actual versus theoretical nature of the harm; otherwise, how are we to consistently apply a standard for determining the extent of the harm? There are a lot more cases that discuss "egregious harm," and finding such harm is exceedingly rare. I believe that, even under those cases, this case could very well be egregious harm.

And if this were a civil proceeding, there would be no question about what we had to do. If the jury is charged on both a proper and an improper theory of liability and the charge is objected to by the party against whom the question is answered, the error in the charge is harmful because the party is unable to know, and therefore unable to show on appeal, that the answer is based on the improper theory. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). The test to overturn a civil judgment for money because of jury charge error is thus easier to meet than when the result might be an erroneous life conviction in a criminal case. If just one juror looked at the definition of intentionally and voted to convict appellant of murder because, at the very least appellant intended to choke Jade (nature of conduct) and she died as a result, appellant has been convicted on conduct that is not murder and had no ability to show actual harm. The definition erroneously given takes from appellant his only viable defense against the charge of murder.

No party has a duty to show or prove the presence or absence of harm. *Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008) ("To dispel any lack of clarity in our cases, we affirm that burdens of proof or persuasion have no place in a harm analysis conducted under *Almanza*."); *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000); *see also Elizondo v. State*, 487 S.W.3d 185, 205 (Tex. Crim. App. 2016) ("Neither Elizondo nor the State has the burden with regard to showing or proving harm. We must make our own assessment as to whether harm occurred."). As the reviewing court, we have an independent duty to determine if appellant was harmed by the improper definition of "intentionally" included in the charge. No jury note stating, "Under the definitions in the charge, do we all have to agree that he intended to cause her death or only that he intended to choke her" was sent out of the jury room. If that is what it takes for us to determine that this is "actual" and not "theoretical" harm, then there will be few cases ever reversed because of charge error. I do not think the test is, or should be, so demanding. In reading the closing arguments, because the charge allowed a conviction on merely the intent to choke Jade, appellant's trial attorney could not argue that, while appellant intended to choke Jade to heighten the sexual pleasure, he did not intend to kill her. To dance around this issue, the argument was made that the death was an "accident." Well, the jury knew, and the State argued, that this, choking Jade, was no "accident."

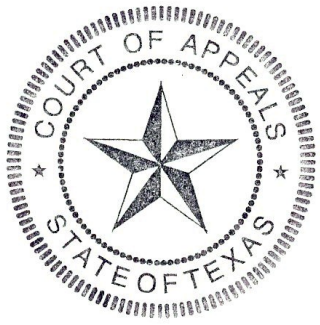
To paraphrase the last sentence from *Jordan* quoted above as applicable to the relevant evaluation in this case:

> The record in this case demonstrates some harm because the only contested issue was intent, and the failure of the definition of "intentionally" to limit the relevant conduct to intending the result made the finding of murder all but inevitable.

The death of this single mother and the circumstances which caused her to be in this situation are exceedingly tragic. But I would have to hold that based on the law as applied to this case as tried, defended, and charged, we must reverse the conviction and remand it for a new trial. Because the Court affirms the trial court's judgment of conviction, I respectfully dissent.

TOM GRAY
Chief Justice

Dissenting opinion delivered and filed May 19, 2021



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